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OPINION OF AUGUST 23, 2013, WITHDRAWN

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-002284-MR

JEFFREY CRAIG DUDGEON — APPELLANT

v.

APPEAL FROM GREEN CIRCUIT COURT
HONORABLE DAN KELLY, JUDGE
ACTION NO. 03-CR-00023

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MAZE, STUMBO, AND VANMETER, JUDGES.

VANMETER, JUDGE: Jeffrey Dudgeon appeals from the December 7, 2011, order of the Green Circuit Court which denied his motion to vacate his conviction and sentence pursuant to RCr[1] 11.42. For the following reasons, we affirm.

[1] Kentucky Rules of Criminal Procedure.

Dudgeon was convicted of one count each of first-degree assault and first-degree burglary, for which he received a thirty-five year sentence. Dudgeon directly appealed his judgment and sentence to the Kentucky Supreme Court, raising claims of error relating to witness sequestering, victim impact evidence, and the prosecution's closing argument. The Supreme Court affirmed.

Dudgeon then filed the underlying RCr 11.42 motion seeking to vacate his conviction and sentence on grounds that his trial counsel rendered ineffective assistance by failing to request a certain jury instruction be given with respect to the first-degree assault charge and Dudgeon's defense of extreme emotional disturbance ("EED"). The trial court denied his motion without conducting an evidentiary hearing. This appeal followed.

On appeal, Dudgeon claims the trial court erred by denying his RCr 11.42 motion. We find it helpful to recite the facts of this case, as summarized by the Supreme Court on direct appeal:

> In the early morning hours of April 26, 2003, Gail Dowell was awakened by a pounding on her back door. Mrs. Dowell's daughter, Jennifer, had gone out drinking the night before, and Mrs. Dowell went to the door apparently concerned that something had happened to her. Unbeknownst to Mrs. Dowell, Appellant had been out that night with Jennifer. Jennifer drove Appellant to a liquor store to pick up beer, and then the pair went to a bar. After the bar quit serving drinks, Jennifer went outside to get a beer from her car. While outside, Jennifer saw some people she knew, and left with them. Appellant was forced to get a ride home from the bar with someone else, and after arriving home, he proceeded to the Dowell residence.

Mrs. Dowell opened the door and Appellant started screaming at her, "Pat Mann f* * * *d me over." Mrs. Dowell knew what Appellant was referring to, because two weeks earlier Appellant had called and told her that Pat had given him two cold checks. Mrs. Dowell told Appellant that she was sorry, but she could not help that. Mrs. Dowell then told Appellant, "[d]o you hear my grandbaby? She is crying. I have to go." Appellant then replied, "[o]h, am I bothering you?" Before Mrs. Dowell could close the door, Appellant asked, "[i]s your husband at home?" Mrs. Dowell replied in the affirmative, and Appellant then asked, "[h]ave you ever heard of the chainsaw massacre movie?" Mrs. Dowell responded that she did not know anything about movies and that she had to go. Mrs. Dowell then shut and locked the door.

Mrs. Dowell then began preparing a bottle for her grandchild who was still crying. While standing at the kitchen sink she heard a sound, and looked outside and saw Appellant attempting to start a chainsaw. Mrs. Dowell threw the bottle down and ran to the bedroom to get her husband, Jimmy Dowell, who had not awakened when Appellant previously knocked on the back door. Mrs. Dowell told her husband that Appellant had a chainsaw and was trying to gain entry to the residence. As Mr. and Mrs. Dowell were coming toward the kitchen, they could hear Appellant trying to cut through the metal on the back door. Just as the two got into the kitchen, Appellant struck a large pane of glass in the door with the chainsaw causing it to shatter. Appellant then began to push his way through the hole in the door.

While Mr. Dowell confronted Appellant, Mrs. Dowell ran to the bedroom where her granddaughter was sleeping. She put a pacifier in the child's mouth, and pushed the child as far back under the bed as she could in an attempt to muffle her cries from Appellant. In the kitchen, Mr. Dowell yelled over the sound of the chainsaw, "[w]hat have I done to you?" Appellant replied, "nothing," and lunged at Mr. Dowell, cutting him and causing blood to splatter on the floor and walls. Mr. Dowell ran out the back door into the yard because he thought Appellant was going to cut off his head and kill

everyone in the house. Mr. Dowell remembered that there was a spade leaning up against the fence and ran to get it to defend himself. He slipped and fell on the grass, and Appellant attacked his right shoulder with the chainsaw. Mr. Dowell turned over and grabbed a bar on the chainsaw with his hand, and during the struggle he was severely cut on his hand, arm, left shoulder, and stomach. He also sustained severe cuts on his chest and face, and one ear lobe was sliced off. Mr. Dowell got up and ran to the end of the yard to the driveway and noticed that his hand was dangling down. Appellant then stopped, looked at Mr. Dowell and said, "[n]ow go call the law," and then left the premises.

While Mrs. Dowell was still hiding under the bed with her granddaughter she began to hear Mr. Dowell whispering, "Gail, Gail." Mrs. Dowell got out from underneath the bed with the child, and went to check on Mr. Dowell. He was standing in the kitchen holding his arm, which was attached to his body by only an inch of skin. Both bones in the arm had been cut in two, and both of Mr. Dowell's shoulders were cut wide open. On the left side of his back he had a large wound that extended through the muscles of the back, down to the bone of the clavicle. Mrs. Dowell, a licensed practical nurse, used shoestrings from her grandson's shoes to make a tourniquet for Mr. Dowell's left arm, put his arm "meat to meat" so the wound could get blood, and pushed the cut muscles back down on his shoulders before she called 911.

An ambulance arrived and transported Mr. and Mrs. Dowell to the Taylor County hospital. Due to the extensive nature of the injuries, the hospital transported Mr. Dowell to the University of Louisville Hospital where he was treated. While at UofL Hospital, Mr. Dowell had four surgeries on his left arm.

After Appellant fled from the house, Kentucky State Police troopers and sheriff's deputies were informed that Appellant was traveling on a four-wheeler. Appellant drove to a friend's house and hid his vehicle

> behind a barn. Police officers arrested Appellant later that afternoon.
>
> A Green County grand jury indicted Appellant for first degree burglary and first degree assault. Prior to trial, Appellant was twice evaluated for competency, and both times he was found competent to stand trial. While incarcerated, Appellant made a phone call that was recorded by police, and later played for the jury. During the call, Appellant stated that he cut his opposition in two, that he got mad at the wrong people, and that he was going to have to pay for it. Appellant also stated that he cut Mr. Dowell with a chainsaw because they slammed a door in his face like it was nothing.

Dudgeon v. Commonwealth, No. 2004-SC-000947-MR, 2006 WL 2452426, *1-2 (Ky. Aug. 24, 2006) (internal footnote omitted).

During trial, Dudgeon set forth the defenses of intoxication and EED. At the conclusion of the trial, the jury convicted Dudgeon of both charges and recommended twenty years on the assault charge and fifteen years on the burglary charge, to be served consecutively. The trial court imposed judgment and sentenced Dudgeon in accordance with the jury's recommendation.

On appeal, we must first address the Commonwealth's argument that Dudgeon's RCr 11.42 motion is procedurally barred since any error regarding the jury instructions could have been raised on direct appeal. We disagree.

In *Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009), the Kentucky Supreme Court clarified:

> [I]n most instances a direct appeal allegation of palpable error is fundamentally a different claim than a collateral attack allegation of ineffective assistance of counsel based on the alleged palpable error. This makes sense

> because the issue "raised and rejected" on direct appeal is almost always not a claim of ineffective assistance of counsel. Instead, the palpable-error claim is a direct error, usually alleged to have been committed by the trial court (e.g., by admitting improper evidence). The ineffective-assistance claim is collateral to the direct error, as it is alleged against the trial attorney (e.g., for failing to object to the improper evidence). Such a claim is one step removed from those that are properly raised, even as palpable error, on direct appeal. While such an ineffective-assistance claim is certainly related to the direct error, it is simply not the same claim. And because it is not the same claim, the appellate resolution of an alleged direct error cannot serve as a procedural bar to a related claim of ineffective assistance of counsel.

Id. at 158.

While the purpose of RCr 11.42 is not "'to permit a convicted defendant to retry issues which could and should have been raised in the trial court and upon an appeal considered by this court[,]'" here, Dudgeon's claim under RCr 11.42 was alleged error of his counsel, and is wholly independent of any claim he could have raised on direct appeal. *Id.* (quoting *Thacker v. Commonwealth*, 476 S.W.2d 838, 839 (Ky. 1972)).[2]

We now turn to the merits of Dudgeon's ineffective assistance of counsel claim regarding the jury instructions.

In order to prove ineffective assistance of counsel, a defendant must show: (1) that counsel's representation was deficient in that it fell below an objective

[2] The Court in *Leonard* emphasized in footnote 3 of that opinion: "Where the collateral ineffective assistance of counsel claim is presented in the course of the direct appeal, as occurred in *Bowling v. Commonwealth,* 981 S.W.2d 545, 549 (Ky. 1998), and *Wilson v. Commonwealth,* 975 S.W.2d 901, 903–04 (Ky. 1998), the issue cannot be re-litigated in a collateral attack. *Bowling* and *Wilson*'s holdings—essentially, that an ineffective assistance claim already rejected in the context of the direct appeal cannot be reraised in the RCr 11.42 motion—are still good law. This, however, is because the collateral issue of ineffectiveness itself, not just the related direct error, had already been raised and rejected."

standard of reasonableness, measured against prevailing professional norms; and (2) that he was prejudiced by counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); adopted by *Gall v. Commonwealth,* 702 S.W.2d 37, 39 (Ky. 1986). In determining whether the specified errors resulted in the required prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different[,]" *i.e.*, "a probability sufficient to undermine confidence in the outcome." *Strickland,* 466 U.S. at 694, 104 S.Ct. at 2068. Judicial review of performance of defense counsel is deferential to counsel and a strong presumption exists that the conduct of counsel falls within the wide range of reasonable professional assistance. *Id.* at 689, 104 S.Ct. at 2065. *See also Hodge v. Commonwealth*, 116 S.W.3d 463, 469 (Ky. 2003), *overruled on other grounds by Leonard*, 279 S.W.3d 151.

The Kentucky Supreme Court has articulated the standard for reviewing RCr 11.42 claims as follows:

> At the trial court level, "[t]he burden is upon the accused to establish convincingly that he was deprived of some substantial right which would justify the extraordinary relief afforded by . . . RCr 11.42." *Dorton v. Commonwealth,* 433 S.W.2d 117, 118 (Ky.1968). On appeal, the reviewing court looks *de novo* at counsel's performance and any potential deficiency caused by counsel's performance. *Groseclose v. Bell,* 130 F.3d 1161, 1164 (6th Cir. 1997); *McQueen v. Scroggy,* 99 F.3d 1302, 1310–1311 (6th Cir. 1996), overruled on other grounds by, *In re Abdur'Rahman,* 392 F.3d 174 (6th Cir. 2004).

> And even though, both parts of the *Strickland* test for ineffective assistance of counsel involve mixed questions of law and fact, the reviewing court must defer to the determination of facts and credibility made by the trial court. *McQueen v. Commonwealth,* 721 S.W.2d 694, 698 (Ky.1986). Ultimately however, if the findings of the trial judge are clearly erroneous, the reviewing court may set aside those fact determinations. Ky. CR 52.01 ("[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witness.") The test for a clearly erroneous determination is whether that determination is supported by substantial evidence. *Black Motor Co. v. Greene,* 385 S.W.2d 954, 956 (Ky.1964). This does not mean the finding must include undisputed evidence, but both parties must present adequate evidence to support their position. *Hensley v. Stinson,* 287 S.W.2d 593, 594 (Ky. 1956).
>
> In appealing from the trial court's grant or denial of relief based on ineffective assistance of counsel the appealing party has the burden of showing that the trial court committed an error in reaching its decision.

Brown v. Commonwealth, 253 S.W.3d 490, 500 (Ky. 2008).

Dudgeon argued that his trial counsel was ineffective for not requesting the following jury instruction ("Paragraph B") regarding the presumption of innocence as it relates to EED:

> (B) If you believe from the evidence beyond a reasonable doubt that the Defendant would be guilty of intentional (assault) under Instruction No. __, **except that you have a reasonable doubt as to whether at the time he [injured] ____ (victim), he was or was not acting under the influence of extreme emotional disturbance**, you shall not find the Defendant guilty under Instruction No. __, but shall find him guilty of (assault under extreme emotional disturbance) under Instruction No. __.

1 William S. Cooper, *Kentucky Instructions to Juries* § 2.03 (4th ed.1999) (emphasis added).

The instruction given to the jury in Dudgeon's case read:

> The law presumes a Defendant to be innocent of a crime, and the indictment shall not be considered as evidence or as having any weight against him. You shall find the Defendant not guilty unless you are satisfied from the evidence alone, and beyond a reasonable doubt, that he is guilty. If upon the whole case you have a reasonable doubt that he is guilty, you shall find him not guilty.

In a separate instruction, the jury was instructed on assault under EED as follows:

> If you believe from the evidence beyond a reasonable doubt that the Defendant would otherwise be guilty of intentional First-Degree Assault under Instruction No. 1, but you further believe from the evidence that when he inflicted the injury upon Jimmy Dowell, he was acting under the influence of an extreme emotional disturbance, you shall not find him guilty of First-Degree Assault, but shall find him guilty of Assault under Extreme Emotional Disturbance under this Instruction No. 2.

Dudgeon contends that the "reasonable doubt" language as to EED, as stated in Paragraph B, should have accompanied the presumption of innocence instruction, and had the jury been so instructed, a reasonable probability exists that the jury would have convicted him of assault under EED, a Class D felony carrying a penalty of one to five years, rather than first-degree assault, a Class B felony carrying a penalty of ten to twenty years. Thus, he asserts a reasonable probability exists that he would have received a lesser sentence if the exact language of Paragraph B had been included.

Section 2.03 of Cooper*, Kentucky Instructions to Juries, Criminal*, addresses guilt phase jury instructions with regards to the presumption of innocence and EED. The Commentary to that section states that Paragraph B is not mandatory. That being said, Kentucky case law has established that an instruction under Paragraph B shall be given if requested and if warranted by the evidence. *Sherroan v. Commonwealth*, 142 S.W.3d 7, 23 (Ky. 2004) (citing *Commonwealth v. Hager*, 41 S.W.3d 828, 831-32 (Ky. 2001); *Holbrook v. Commonwealth*, 813 S.W.2d 811, 815 (Ky. 1991), *overruled on other grounds by Elliott v. Commonwealth,* 976 S.W.2d 416 (Ky. 1998); *Edmonds v. Commonwealth,* 586 S.W.2d 24, 27 (Ky. 1979), *overruled on other grounds by Wellman v. Commonwealth*, 694 S.W.2d 696, 697 (Ky. 1985)).

Generally, jury instructions must be considered as a whole. *Epperson v. Commonwealth*, 197 S.W.3d 46, 60 (Ky. 2006). With that premise in mind, we find that even if Dudgeon's trial counsel should have requested the exact language of Paragraph B, Dudgeon was not prejudiced in any way by counsel's failure to do so. The second prong of the *Strickland* analysis requires a defendant to show prejudice, *i.e.*, a reasonable probability that "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* 466 U.S. at 694, 104 S.Ct. at 2068.

Here, the jurors were instructed as to the presumption of innocence - reasonable doubt standard and, in a separate instruction, were directed not to convict Dudgeon of first-degree assault if they believed that he was acting under

EED when he inflicted the injury upon the victim; instead, they were to find him guilty of assault under EED. Considering the instructions that were given and the overwhelming evidence introduced against Dudgeon at trial, we do not believe a reasonable probability exists that but for the failure to include the exact language of Paragraph B in the jury instructions, a different outcome would have resulted. Accordingly, Dudgeon has failed to satisfy the *Strickland* test so as to merit relief under RCr 11.42.

The Green Circuit Court order is affirmed.

ALL CONCUR.

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